United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL 75-5262 76-7281

United States Court of Appeals
For the Second Circuit

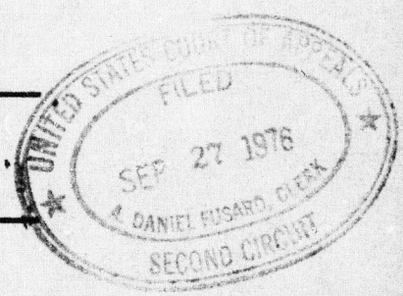
B
P/S

PRESCRIPTION PLAN SERVICE CORPORATION,
Plaintiff-Appellant,

-against-

ALBERT FRANCO, individually and as Administrator, SHANNON J. WALL, MARTIN F. HICKEY, MEL BARISIC, F.K. RILEY, Jr., RICK MILLER, E. MARCUS, JAMES J. MARTIN, W.I. RISTINE, PETER BOCKER, E.G. DENYS, ANDREW RICH and KENNETH W. GUNDLING, individually and as Trustees of the NMU PENSION & WELFARE PLAN,
Defendants-Appellees.

On Appeal From the United States District Court For The Southern District of New York



APPELLANT'S BRIEF

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UNITED STATES COURT OF APPEALS
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PRESCRIPTION PLAN SERVICE CORPORATION,

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APPELLANT'S BRIEF

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Preliminary Statement

This is an appeal (83a)* from an Order of the United States District Court for the Southern District of New York, per Hon. Gerard L. Goettel dismissing the action for want of federal jurisdiction (86a-96a). A

* References are to pages of the Joint Appendix. Where direct reference to the Record on Appeal is necessary, the page citation will bear the suffix "r".

judgment of dismissal (85a) entered after the filing of the notice of appeal comes, of course, within the ambit of this appeal.

STATEMENT OF THE ISSUES PRESENTED

1. Whether a complaint pleading an action for fraud and deceit practiced on a contract administrator of pharmaceutical benefit services for a trusteed welfare plan, covered by section 302 of the Taft-Hartley Act, by the trustees and administrator of such a plan, where the purpose of the fraud is to conceal and otherwise implement their scheme to divert and apply trust funds in criminal violation of the statute, sets forth a federal common law tort subject to the federal question jurisdiction of the district court and properly supports, under the doctrine of pendent jurisdiction, a related second cause of action on the contract for the services?

2. Whether under Rule 19 of the Federal Rules of Civil Practice each of the trustees of a Taft-Hartley regulated welfare plan is so indispensible as to require, in this case, the joinder of the two allegedly resident trustees as parties defendant along with the ten non-resident trustees to sustain an action against the trust even though diversity jurisdiction is thus destroyed?

3. Whether, in the event neither federal question nor diversity jurisdiction can be sustained against the welfare plan in this case, enough remains in the pleaded action for fraud and deceit to proceed herein against the admittedly non-resident defendants-appellees in their individual capacities as tortfeasors under diversity jurisdiction?

Statement of the Case

The Complaint

The complaint (3a-9a) claims jurisdiction for the district court under both federal question and diversity of citizenship headings. With respect to the federal question, the complaint alleges that the action derives from section 302(e) of the Labor-Management Relations Act of 1947, the Welfare and Pension Plan Disclosure Act of 1958, "and other pertinent federal statutes"(4a). Under diversity the allegation is that , as against the New York corporate plaintiff, none of the defendants resides in New York State.

The complaint alleges for a first cause of action that the defendants-appellees, sued as individuals and as Administrator and Trustees, respectively, of the NMU Pension & Welfare Plan (hereinafter "Plan") practiced an actionable fraud and deceit upon plaintiff-appellant (hereinafter the "service corporation"). Acting on a scheme and conspiracy to accomplish an illegal diversion, violative of Taft-Hartley's section 302, of trust moneys from legitimate trust applications to the aggrandisement of the Union sponsor of the Plan, the funding of expensive equipment purchases and personnel staffing at the Plan's expense and on the Plan's payroll, but for the Union's own work, the political needs of its administration, and the fulfilment of its patronage requirements, all, of course, without expense to the Union, the Trustees and Administrator made fraudulent use of the service corporation to implement and further their scheme. To that end, the complaint alleges, upon false promises to the service corporation of a *bona fide* opportunity for a rewarding future relationship in

in return for the service corporation making present sacrifices, and other deliberate misrepresentations plus active concealment of purpose more fully alleged therein, the service corporation was induced to enter into two successive, highly disadvantageous pharmaceutical prescription service contracts with the Plan, and finally at the beginning of 1975, the defendants knowing that their scheme would come to fruition in the ensuing few months, presented the service corporation with a "reward" in the form of an extension of the prior agreement with the Plan but providing a formula of minimum guaranteed payments per six month sequence which actually worked out to $36,948.00 on monthly payments of $6,158.00 per month (7a,8a,45a,46a). Needless to say, with their illegal objectives in place, defendants allowed the service corporation the minimum time to enjoy its new equity and cancelled at the end of the first half of 1975.

The second cause of action, against the Plan, is based on the minimum guarantee feature of the contract of January 11, 1975 (8a,9a), and addresses itself to the failure of the Plan to make additional minimum payments to the service corporation. Plainly this cause of action in contract would be pendent were it held that the first cause pleaded a federal common law tort; and would be jurisdictionally sustainable in its own right were the suit allowed to rest on diversity jurisdiction.

The Course of the Proceedings

The complaint was filed on October 23, 1975 (1a) and the writ was given to the Marshal with instructions to make service on defendant Franco, the Administrator of the Plan.

The marshal's return showed that, on October 29, 1975, the deputy had served the summons and complaint on one Ned Phillips, Attorney (10a). From the affidavit of Ned R. Phillips of February 11, 1976 it now appears that Franco directed the deputy to make service of the papers on counsel and that accordingly Mr. Phillips accepted them (78a,79a).

In any event counsel stipulated enlargement of time to answer or move in response to the complaint (3r,4r)and, from an appearance standpoint, all of the defendants, Administrator and employer Trustees on the one hand, and Union appointed Trustees on the other, appeared to be represented, without qualification, by counsel. Not until defendants moved for jurisdictional dismissal late in December 1975 did counsel disclaim any authority to appear for defendants <u>as individuals</u> on the ground there had been no personal service of process (11a,64a), although jurisdiction over the persons of the defendants in their <u>representative</u> capacity (Denys and Marcus, former trustees, excepted-12a) was conceded to the Court. The main factual thrusts of the dismissal applications were the affidavits of Trustees Barisic (48a) and Miller (50a) asserting their New York State citizenship and in each affidavit supplying a New York State residence address. The affidavit of Plan Administrator Franco (14a-28a) which carries the arguments of the jurisdictional and, to some extent, substantive attack on the service corporation's claims, also makes the same terse assertion of New York citizenship and supplies a New York State residence address (25a). The affidavits of the remaining ten Trustees explicitly claim citizenship and residence outside of New York State.

Appellant's counter to the jurisdictional attack was its cross-motion to drop the allegedly resident defendants and amend the caption accordingly (68a). Although the address side of the exhibited Civil Cover Sheet (77a) showed suburban New Jersey addresses, gathered from current telephone directories, for Albert Franco and for individuals with names as distinctive as Mel Barisic and Rick Miller (73a), these defendants did not thereafter bring forward any further proof of citizenship whether in disavowal of a New Jersey residence, voting site, etc., nor were they so required to do. Nevertheless, since we regarded the alleged New Yorkers as not indispensible parties, we felt that dropping them as parties defendant in accordance with our cross-motion would put the jurisdictional question beyond legitimate dispute (74a) and, in view of defendants' stance of being "half in and half out" (72a) - sued in their official capacity by virtue of counsel's limited authorization in accepting service, but not in their individual capacities because of lack of such service - we elected to regard the named defendants as not yet served (72a,73a), and thereby avoid the possible flaw of having brought in parties whose presence might destroy diversity jurisdiction.

The matter, originally assigned to Hon. Charles E. Stewart, Jr., was reassigned to Judge Gerard L. Goettel by Notice dated May 24, 1976 (82a). He scheduled and heard oral argument on the applications; and post argument letter-memoranda, stipulated into the Record on Appeal (20r), were dispatched to him. Since the undersigned's letter of June 7, 1976 was, in effect, a request for relief somewhat dif-

ferent from the formal notices, and dealt with by Judge Goettel in his opinion (98a), we annex that letter as an appendix to this brief.

The Opinion

The opinion (86a-98a) ordered dismissal for want of either federal question or diversity jurisdiction in the case. With respect to the issue of federal question jurisdiction, the Court found no statutory action available to plaintiff under Taft-Hartley's section 302 or the Disclosure Act (89a-92a) and hence no federal question jurisdiction of the case. With respect to the diversity jurisdiction, the Court found that all trustees, in a suit touching upon a trust, are indispensible parties so that joinder of all is required - at least to the extent of availability for service of process (97a) - even though diversity is destroyed in the process (94a-98a).

Finally, with respect to the proposal that suit on the first cause of action for fraud and deceit be allowed to be continued against the non-resident defendants in their individual capacities, the Court wrote:

> " * * * the involvement, if any, of the defendants was in their representative capacities as trustees of the Fund and such involvement does not give rise to personal jurisdiction over the defendants as individuals. * * * " (98a)

Summary of Argument

In our view of the case, the most fundamental errors of the Court below lie in its:

1. Failure to as much as cite and abide by the mandates of Provident Tradesmens Bank v. Patterson, 390

U.S. 102 (1968);

2. Failure to make any attempt to apply the standards of Rule 19, FRCP, much less heed its (and the Supreme Court's) caveat against forcing a joinder where it would "deprive the court of jurisdiction over the subject matter of the action";

3. Confusion, expressed in the second paragraph of 92a, of an argument for the highly discretionary and expressly "practical" approach regarding joinder of parties under Rule 19 FRCP in a diversity case, with the more strictured field of federal-state jurisdictional relationships, e.g.,

> "Were the question of federal versus state jurisdiction a matter for discretion, this argument might have some force * * * ."

The Court thus went in an absolutely opposite direction from that mandated by Rule 19;

4. Failure to recognize that the commission of an actionable fraud and deceit by an individual, alone or in concert and in whatever capacity whether representative or personal, gives rise to a tort action for fraud and deceit against that individual.

5. Concentration upon demolishing the straw man of a statutory cause of action (89a-92a), not claimed here (92a), while refusing to give any consideration to the claim that the tort of fraud and deceit committed as part of and implementing a scheme and conspiracy of trustees for diversion of trust funds, criminal under Taft-Hartley's section 302, should be held to constitute a federal common law tort (92).

POINT I

THE DISTRICT COURT HAS FEDERAL QUESTION JURISDICTION OF THIS CASE UNDER 28 U.S.C. § 1331

Section 302(c)(5) of the Taft-Hartley Act is the definitive and comprehensive regulator of the organization, scope and purposes of trusts established in collective bargaining on the basis of employer contributions. Unlike other trusts, Taft-Hartley alone, and no state law, is the authority looked to for the resolution of the validity of applications of funds, the purposes for which the trusts may validly make benefits, the exact nature of benefits which may be administered by such a trust, the balanced mode of organization of such a trust, a statutorily prescribed procedure for breaking deadlocks among trustees, and virtually all aspects of its organism and functions.

Judicial supervision of this statutory area is vested exclusively in the federal district courts who alone may try and punish those who willfully violate any of the provisions of the section (§ 302(d)), and who, with their statutory grant of injunctive powers (§ 302(e), have built up the impressive body of case law authority giving depth and texture to the statutory outline.

Perhaps the keystone and certainly the central purpose of the statutory scheme, the interest most sought to be protected, is the establishment of such trust funds " * * * for the sole and exclusive benefit of the employees * * * their families and dependents * * * ." We assert no identification for ourselves with the classes of interested persons sought to be protected by the statutory scheme, and we agree

with our adversaries and with the Court below (89a-92a) that we have no standing to bring a statutory action under section 302 (or under the Welfare & Pension Plan Disclosure Act of 1958; 29 U.S.C. § 301, et seq., for that matter). But nothing in those Acts or any other statute deprives us of our right to bring a common law action for damages for fraud and deceit, and our right, should our allegations prove out, to a recovery.

The real question here - innovative perhaps, but consistentwith a body of living, growing and adequate law - is whether this common law action for a fraud which is part and parcel of a larger scheme and conspiracy by Trustees and Administrator to divert the funds of a Taft-Hartley trust from their Taft-Hartley purposes and Taft-Hartley beneficiaries; a fraud designed to accomplish a dual role in the diversion of funds for the aggrandisement of the sponsoring Union, its administration, and the administration's political patronage requirements (4a) by gaining time to accomplish the diversionary maneuver, and providing a base from which the funds "saved" from the deliberately blighted pharmaceutical benefit could be accumulated for the illegal purpose, is not so saturated with federal law and federal statutory policy as not properly to be deemed a federal common law tort? Looked at another way, it seems palpably wrong to require state courts and litigants to have state adjudication of so many issues which, in all other respects, are exclusively in the federal domain.

We believe that reason and authority support the conclusion that the first cause of action pleaded is

a federal common law tort. As Douglas, J. said in an analogous, though more pioneering, situation in Textile Workers of America v. Lincoln Mills of Alabama, 353 U.S. 448 at 456,7 (1957):

" * * * We would undercut the Act and defeat its policy if we read § 301 narrowly as only conferring jurisdiction over labor organizations.

"The question then is, what is the substantive law to be applied in suits under § 301(a)? We conclude that the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. * * * The Labor-Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislationand fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. See Board of Commissioners v. United States, 308 U.S. 343, 351. Federal interpretation of the federal law will govern, not state law. Cf. Jerome v. United States, 318 U.S. 101, 104. But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate federal policy. See Board of Commissioners v. United States, supra, at 351-352. Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.

"It is not uncommon for federal courts to fashion federal law where federal rights are concerned. * * * Congress has indicated by § 301(a) the purpose to follow that course here. There is no constitutional difficulty. Article III, § 2, extends the judicial power to cases 'arising under ... the laws of the United States ....' The power of Congress to regulate these labor-management controversies under the Commerce Clause is plain. * * * A case or controversy arising under § 301(a) is, therefore, one within the purview of the judicial power as defined in Article III."

Again, if the Court below were to have its way, the fact that statutory private suits under section 302(e) of Taft-Hartley are limited to actions for injunctive relief at the suit of limited classes of persons, would also be the only way in which the policies of section 302 could

be shaped and vindicated short of criminal prosecution under section 302(d). For a statute sounding policies as strong as 302's, we feel that such a straitjacket is unwarranted. In analogous situations such has not been the policy of our federal courts. See, e.g.:

Weinberger v. New York Stock Exchange (SDNY 1971) 335 F. Supp. 139

Fitzgerald v. Pan American World Airways (2 Cir. 1956) 229 F. 2d 499

J.J. Case v. Borak, 377 U.S. 426 (1964)

POINT II

SINCE THE INDIVIDUALS PROPOSED TO BE DROPPED AS PARTIES DEFENDANT BEFORE SERVICE OF PROCESS ARE NOT INDISPENSIBLE WITHIN THE MEANING OF RULE 19 OF THE FEDERAL RULES OF CIVIL PROCEDURE, THE APPELLANT IS ENTITLED TO PROCEED WITH BOTH CAUSES OF ACTION INTACT UNDER DIVERSITY JURISDICTION.

Although the Court below toys with the notion that a trust may have a citizenship of its own, e.g.:

> "Moreover, the defendants have alleged and proved by affidavit that three of the individual defendants, and the Fund itself, are citizens of New York, thus destroying diversity jurisdiction." (93a)

and,

> "If the Fund's citizenship is looked to, there is an obvious lack of diversity since its principal place of business is in New York." (96a),

the Court does, assuming the unavailability of diversity jurisdiction, accurately state both the status of the Plan and the issue under diversity:

> "The parties agree that the Fund is not a juridical entity, has no separate existence and, therefore, does not have citizenship for diversity purposes. It is acknowledged that, to sue the Fund, the plaintiff must sue the trustees. The question therefore, is whether diversity jurisdiction may be maintained where two of

the trustees are New York citizens. (Defendants acknowledge that the Administrator of the Fund, a New York resident, is not a necessary party to the litigation.)" (93a, 94a)

What is truly amazing is that nowhere in its extensive opinion does the Court below as much as cite Provident Tradesmens Bank v. Patterson, 390 U.S. 102 (1968), nor as much as discuss the application of the detailed criteria set forth by Rule 19, FRCP, let alone apply them. Destruction of diversity jurisdiction by joinder of a resident party is looked upon as something to be avoided if at all possible by both the express language of Rule 19(a) and our Supreme Court. Thus Harlan, J., in Provident Tradesmens Bank, supra at pp. 108, 109:

> "We may assume at the outset, that Dutcher falls within the category of persons who, under § (a), should be 'joined if feasible.' The action was for an adjudication of the validity of certain claims against a fund. Dutcher, faced with the possibility of judgments against him, had an interest in having the fund preserved to cover that potential liability. Hence there existed, when this case went to trial, at least the possibility that a judgment might impede Dutcher's ability to protect his interest, or lead to later relitigation by him.
>
> "The optimum solution, an adjudication of the permission question that would be binding on all interested persons was not 'feasible,' however, for Dutcher could not be made a defendant without destroying diversity. Hence the problem was one to which Rule 19(b) appears to address itself: in the absence of a person who 'should be joined if feasible,' should the court dismiss the action or proceed without him? * * * *
>
> "We conclude, upon consideration of the record and applying the 'equity and good conscience' test of Rule 19(b), that the Court of Appeals erred in not allowing the judgment to stand."

Implicit in the opinion below is the acceptance of the chamber of horrors argument that once a manipulation of parties is allowed to attain diversity jurisdiction, the

floodgates of indiscriminate forum jockeying will have been opened and an important barrier against the litigation explosion will have been removed. Hence the Court sticks rigidly to the formalism of requiring all of the trustees of a trust to be joined as parties, even though it worries about the manipulative possibilities thus opened to the other side:

> "Admittedly, some difficult jurisdictional questions could arise with a large union trust having trustees in each of the states of the Union. It might not seem reasonable, under some circumstances, to require joinder of all trustees and to nullify diversity jurisdiction because of the multiple citizenships. * * * " (96a, 97a)

Yet, if indispensibility of a trustee can yield to the pressures of his unavailability for service, per Booth v. Security Mutual Life Insurance Company, 155 F. Supp. 755 (D.N.J. 1957) cited in the opinion (97a), no reason is given why the other arm of Rule 19(a),

> "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if * * * "(emphasis supplied),

is not similarly deserving of application.

Applying the no less than eight criteria for determining dispensibility or indispensibility of parties expressly set forth in Rule 19(a) and (b) leaves the case for the indispensibility of the two allegedly New York resident trustees a very minimal one indeed. Both are available as witnesses and the trust which they administer is affected not at all by their formal presence or absence. As for possible personal liability of the two alleged New Yorkers they are, if anything, relieved by being omitted and any judgment that issues could make ample provision for

their protection. Should the remaining defendants feel a need to assert liability over should a verdict favor the plaintiff, they have the requisite diversity for bringing in the omitted trustees as third party defendants.

It is the fourth criterion of Rule 19(b) which, in our opinion, mandates the granting of our cross-motion for leave to drop the alleged New Yorkers as named defendants, and the retention rather than the dismissal of the suit:

> "Rule 19(b) * * * whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

On the importance of this criterion, Harlan, J. in Providence Tradesmens Bank v. Patterson, supra at p. 109, remarked:

> " * * * First, the plaintiff has an interest in having a forum. Before the trial, the strength of this interest obviously depends upon whether a satisfactory alternative forum exists.[3]

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3. The Advisory Committee on the Federal Rules of Civil Procedure in its Note on the 1966 Revision of Rule 19, quoted at 3 Moore, Federal Practice ¶19.01 (hereinafter cited as 'Committee Note', comments as follows on the fourth factor listed in Rule 19(b), the adequacy of plaintiff's remedy if the action is dismissed: '/T/he court should consider whether there is any assurance that the plaintiff, if dismissed, could sue effectively in another forum where better joinder would be possible.' See Fitzgerald v. Haynes, 241 F. 2d 417, 420(C.A.3rd Cir.); Fouke v. Schenewerk, 197 F. 2d 234, 236 (C.A.5th Cir.)."

The effect of the dismissal here on plaintiff's chances of reconstituting its action in another forum "where better joinder would be possible" is devastating. Add to this the predominantly federal character of the substantive law governing the case and the important elements of judicial familiarity and expertise which we urged upon the Court below (92a) as reasons for retention of the case and the

reasons, in equity and good conscience, for retention rather than dismissal, in our opinion, become compelling.

The Court below relied heavily upon Morrissey v. Curran (SDNY 1975) 76 CCH Lab. Cas. 18370; 88LRRM 3356 (91a) and quoted a lengthy passage from it at 95a. But however valid its holding of the indispensibility of employer appointed trustees in a Taft-Hartley federal question section 302 lawsuit where joinder did nothing to oust the Court of jurisdiction, it is patently obiter in a diversity context, and it was neither intended nor can it be taken to go against the authority of Provident Tradesmens Bank nor Rule 19 itself. And surely the Court below is not correct in concluding from the fact that Barisic signed two of the three contracts in the case that, "Surely he /Barisic/ is a necessary party in this litigation. Accordingly there is no basis for diversity jurisdiction." (98a), any more than that diversity would be found if a non-resident trustee had signed them.

In short, assuming the Court below was correct in finding no federal question in this case, it was error on its part to have denied our cross-motion and to have dismissed for want of diversity jurisdiction.

POINT III

INSOFAR AS THE COMPLAINT PLEADED A CAUSE FOR FRAUD AND DECEIT AGAINST THE NON-RESIDENT TRUSTEES AS TORTFEASORS IN THEIR INDIVIDUAL CAPACITIES, THE COURT COULD NOT VALIDLY DISMISS THE FIRST CAUSE OF ACTION FOR WANT OF DIVERSITY JURISDICTION.

The argument for this point is made in the undersigned's letter to Court of June 7, 1976 (20r) of which a

copy is appended hereto. Although the argument for tort liability of the trustees as individuals represented the lowest common denominator of jurisdictional unassailability, and the details of conspiratorial fraudulent deeds were treated at considerable length in the complaint (4a-8a), still the argument was given short shrift in the rush to dismissal (98a) and, astoundingly, we were informed that the fraud of a trustee is done in a "representative" capacity and does not give rise to a personal liability. Further we were told, without opportunity to plead over, that we had not pleaded fraud 'with particularity'.

The authority we had cited abundantly established that there is no necessity for joining joint tort feasors:

Herpich v. Wallace (5 Cir. 1970) 430 F. 2d 792

Union Paving v. Downer Corp. (9 Cir. 1960) 276 F. 2d 468

Martin v. Chandler (SDNY) 85 F. Supp. 131 (1949)

Planning & Investing Co., S.A. v. Hemlock (SDNY) 50 FRD 48 (1970)

Humble Oil & Refining Co. v. Harang (D.C. La.) 262 F. Supp. 39 (1966)

Carl Gutmann & Co. v. Rohrer Knitting Mills (D.C. Pa.) 86 F. Supp. 506 (1949)

Decorative Cabinet Corp. v. Stor-Aid of Ohio (SDNY) 10 FRD 266 (1950)

Our feeling is that the opinion and judgment of dismissal herein are reflective more of an intuitive feeling of the Court below about the merits of the case than a reluctant constraint to make jurisdictional dismissal of the cause. Certainly the disparagement of the facts of the case evident in the opinion, and the brusque treatment of the argument advanced under this heading seem to justify the feeling that

a better regard for the merits of the case might very well have led to a different result. Aside from our position that the rigidity of treatment of the jurisdictional question raised here makes for bad law, the practical result is that we have been deprived of our day in court by the most summary of summary judgments. Seldom is there a breakthrough from the subliminal, but we identify with the majority in Mach-Tronics, Incorporated v. Zirpoli, 316 F. 2d 820 (9 Cir. 1963) in the following exchange, Duniway, C.J., dissenting at pp. 836, 837:

> "Nothing is easier than to draw an unverified complaint charging a nationwide or worldwide conspiracy by two large corporations to violate the antitrust laws. I thinkthat the court, from an examination of the pleadings, could well have had a feeling that the probability is that there is nothing to the antitrust charges contained in the federal complaint, however well pleaded they may be. * * * *
>
> "This is not the first case, nor will it be the last, in which a trial court may feel that it is being used ***. * * * * It may happen that, following decision in the state court, the pending antitrust case will be quietly dropped."

To which, Pope, C.J., speaking for the majority, replied at p. 834, 835:

> "The dissent makes clear where our difference lies. Judge Duniway thinks that the trial judge 'had a feeling' as to the lack of merits of the antitrust charges, that the trial court 'may feel' that it is being used for purely tactical purposes, and that it may grant a stay based upon such 'feel' or 'hunch'.[21] It is our position that judicial action should not be based on 'feelings' before trial, but rather that judicial action may properly be taken only after evidence, hearing, and findings."

CONCLUSION

WE RESPECTFULLY URGE THAT THE JUDGMENT AND ORDER OF DISMISSAL HEREIN BE REVERSED ON THE MERITS AND THAT THE CASE BE REMANDED FOR FURTHER PROCEEDINGS IN REGULAR COURSE.

Dated: New York, New York
September 27, 1976

Respectfully submitted,

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June 7th, 1976

Hon. Gerard L. Goettel
United States District Court for
the Southern District of New York
U.S. Courthouse
Foley Square
New York, N.Y. 10007

Re: Prescription Plan Service Corporation v. Franco, et al.
75 Civil 5262 GLG

Dear Judge Goettel:

Following the argument of the jurisdictional applications herein, I looked at Sanders v. Birthright, 172 F. Supp. 895, 897 (S.D. Indiana 1959) and Shepperdized it.

Sanders, in the context of Taft-Hartley trustees, stands for the familiar proposition that the presence of resident trustee parties will destroy the diversity basis of a suit in federal court. However neither Sanders nor the cases citing it answer our crucial question, viz., whether the presence of a resident trustee as a party is so "indispensible" as to require his inclusion even though Rule 19(a) of the Federal Rules of Civil Procedure seems to except anyone whose inclusion as a party would destroy the subject matter jurisdiction of the Court, thus: "A person * * * whose joinder will not deprive the the court of jurisdiction over the subject matter of the action shall be joined * * * if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest /which/ * * * may (i) as a practical matter impair * * * his ability to protect that interest or (ii) leave any * * * parties subject to a substantial risk of incurring * * * inconsistent obligations by reason of his claimed interest. * * * " (emphasis supplied)

Although I have been unable to find any case applying Rule 19, FRCP, to this precise situation, I have found authority which holds that where, for one reason or another, a trustee cannot be brought in as a party, the case will nevertheless proceed without him. Thus, in addition to Booth v. Security Mutual Life Ins. Co., 155 F. Supp. 755,761 (D.C. N.J. 1957) cited in my brief at page 7, I respectfully call your attention to Soar v. National Football League Players' Association, 65 F.R.D. 531 (D.C. R.I. 1975) and to Gediman v. Anheuser Busch, Inc., 193 F. Supp. 72 (E.D.N.Y. 1961), reversed other grounds 299 F. 2d 537, all of which fully indicate that the "indispensible" requirement for all trustees to be made parties is not so inflexible as to interdict an action from going forward, circumstances justifying, without them. And the New York State cases, without the benefit

of Rule 19, FRCP, are in accord:

O'Hayer v. St. Aubin, 44 Misc. 2d 786; 255 N.Y.S.2d 101 (Sup. Westchester 1964), affd. 24 A.D. 2d 604, 262 N.Y.S. 2d 225

Castaways Motel v. Schuyler, 24 N.Y. 2d 120 (1969)

In the latter case, speaking to New York's joinder statute, §1001, CPLR, the New York Court of Appeals held that it was the general policy of the CPLR section to "limit the scope of indispensibility to those cases and only those cases where the determination of the court will adversely affect rights of nonparties."

In the actualities of this case, as my brief argues, "indispensibility" for the presence of the two allegedly resident trustees, whatever its validity in the legal definition of the trust, has little, if any, impact on the issues, notably the liability of the trust as an entity, as well as the liability of individuals. Jurisdictional dismissal would, in my view, be a triumph of formalism over the equitable considerations urged by Rule 19 of the Federal Rules of Civil Procedure.

If, however, the Court feels constrained to make jurisdictional dismissal of the action because of the indispensibility for for the presence of all trustees as parties defendant and the incompatability of that presence with diversity jurisdiction, there remains a fall back position still available to plaintiff. All of the defendants are sued in a dual capacity, viz., as individuals and as Trustees of the NMU Pension & Welfare Plan. Assuming arguendo the validity of the dismissal applications with respect to the status of the defendants as trustees and of the trust itself, the non-resident trustees remain proper defendants under diversity jurisdiction on the first cause of action as individual conspirators and fraud tortfeasors misusing the office of trustee for the illegal purposes described in the complaint's first cause. The authorities cited in page 5 of my brief give ample authority for the proposition that in the area of suit against conspirators and joint tortfeasors, a plaintiff may elect to sue those he desires to make parties defendant and he is not obliged to join all conspirators and all tortfeasors. To the extent of our cross-motion to amend the caption by dropping the allegedly resident defendants Franco, Barisic and Miller, the remaining, non-resident, defendants are still properly available as individuals in a diversity suit.

Such a ruling would necessitate dropping the inclusion of the remaining defendants in their capacity as Trustees, dropping the NMU Pension & Welfare Plan as an entity being sued, and dismissing the second cause of action, which lies only against the trust, without prejudice to its prosecution elsewhere. Little amendatory effort to conform the first cause with such a ruling would be required.

The foregoing is, of course, a backup position. We believe it would be error to grant defendants' jurisdictional dismissal applications and to deny our cross motion to amend the caption by dropping the allegedly resident defendants; but we also believe that our

right to prosecute the first cause of action as our suit against the non-resident defendants as individuals is unassailable.

Respectfully submitted,

Milton Horowitz,
Attorney for Plaintiff

MH/es

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HOROWITZ

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 27 day of Sept. 1976 deponent served the within Brief upon

Proskauer Rose Goetz & Mendelsohn, Esqs. and
Abraham E. Freedaman, Phillips & Cappiello, Esq.

attorney(s) for
Defendants-Appellees

in this action, at

300 Park Avenue
New York, N.Y. 10022 and

346 West 17th St.
New York, N.Y. 10011 respectively
the address(es) designated by said attorney(s) for that purpose by depositing

3 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this 27 day
of Sept. , 1976

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978